No. 13,959

IN THE

United States Court of Appeals

For the Ninth Circuit

VICTOR GOTHBERG, an individual, d/b/a Gothberg Construction Company,
Appellant and Appellee,

vs.

BURTON E. CARR,
Appellee and Appellant.

On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE-APPELLANT BURTON E. CARR and ANSWER TO APPELLANT'S BRIEF AND BRIEF ON CROSS-APPEAL.

BELL & SANDERS,
BAILEY E. BELL,
WILLIAM H. SANDERS,
Central Building, Anchorage, Alaska,
Attorneys for Burton E. Carr, Appellee-Appellant.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

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JURISDICTION.

The jurisdiction of the District Court was invoked and authorized under the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended 48 U.S.C.A., Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The Circuit Court of Appeals has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U.S.C.A., June 25, 1948, c. 646, 62 Stat. 912, Also, Section 8C of the

Act of February 13, 1925, as amended. (28 U.S.C.A. 1294.) Practice in the district Court for the district of Alaska and appeals from the judgments rendered in said Courts are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U.S.C.A. 103A.

STATEMENT OF FACTS.

This action was originally filed in the District Court, Third Judicial Division, Anchorage, Alaska, by Victor Gothberg, an individual d/b/a Gothberg Construction Company, the Plaintiff, v. Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, by the filing of a complaint. (Tr. 3.) In the complaint, the plaintiff asked for judgment against *plaintiff* for $17,174.16, together with interest thereon at the rate of 8% from March 1, 1951, and costs and disbursements, including attorney's fees. The Court dismissed the action as against the defendants Jack Akers and Sherman Johnstone and the plaintiff filed an amended complaint (Tr. 23), in which he prayed judgment for $17,174.16, with interest, and asked for judgment against the *plaintiffs* again. To the complaint the defendant Marie Carr, who was sued as Jane Doe Carr, filed an answer (Tr. 10) in which she denied all the allegations contained in the plaintiff's complaint and prayed the dismissal of the complaint against her and that she be allowed a reasonable at-

torney's fee for the defense of the action which we will mention further on in this brief. To this amended complaint, an amended answer was filed by Burton E. Carr (Tr. 37) in which he adopted by reference all allegations in the original answer and cross-complaint filed in the action and in addition thereto, made some specific allegations to the effect that the work that was performed was so defective that the defendants owed plaintiff nothing, and did allege that he entered into a contract with the plaintiff on the 19th day of September, 1950, for the construction of a building and did agree to pay therefor when finished $38,450.00, but specifically alleged that the plaintiff never finished said building, left the same in an unfinished condition, that any law suit brought to recover on this contract, is prematurely filed because the contract has never been complied with and that he cannot maintain an action for the contract price, and that therefore he is not indebted to the plaintiff for any sum whatsoever (Tr. 38), and further alleges that the plaintiff did do some extra work on the building in the reasonable value of $2,500.00, but the defendant had previously paid the plaintiff $34,-672.57 in cash and paid bills that were the just obligations of the plaintiff and he had more than paid for all the work performed by the plaintiff for the defendant, and in the prayer of said answer, he prayed that plaintiff take nothing and that this defendant recover on his cross-complaint, the sum of $20,000.00 as set forth therein, which cross-complaint

is specifically made a part of the answer as fully as if set out and re-alleged herein in full.

For some reason, when the appellant-appellee, Victor Gothberg, had this transcript printed, he omitted the whole cross-complaint from the original answer and cross-complaint, although in the designation of the record for printing, the appellee-appellant designated as a part of the record the original answer, which was one document headed "Answer and Cross-Complaint", and was a continuation directly through the instrument. (See:—Answer and Cross-Complaint in original files.) That by the stipulation filed on the 3rd day of August, 1953, which is in the original files, it was stipulated that the original files and pleadings, including all exhibits and a full transcript of the docket entries and transcript of the evidence, be filed in the Circuit Court of Appeals in lieu of making and filing a transcript thereof, which shows conclusively that there is an omission from the printed record, the cross-complaint of the defendant, Burton E. Carr, and this appellee-appellant will petition this Honorable Court to have printed and made a part of the record this cross-complaint, as it should have been done by the appellants-appellee, Victor Gothberg, in the printing of the transcript, since there is no separation between the original answer and the cross-complaint, as may be easily seen by checking the record. By the terms of said answer and cross-complaint, originally field, to which was attached a copy of the written contract referred to,

the defendant and cross-complainant in the lower Court, who is the appellee and cross-appellant here, alleged:

a. That the plaintiff failed to comply with the terms of the two written contracts, specifications and plans in the following:

b. That the principal contract provided for the furnishing of a bond to guarantee the compliance with the terms of the contract which the plaintiff (Gothberg) never furnished even though requested so to do.

c. That the plaintiff failed to hook up the lights on the 76 pump.

d. Failed to install one globe for window light on the marquee.

e. Failed to install front window glass that would fit the opening made by the plaintiff and did cause to be installed a glass therein that is unsafe, too small for the opening and does not meet the requirements of the plans and specifications.

f. Failed to install a proper shut-off valve below the concrete in front of the building to prevent the freezing of the outside hydrant and did install a hydrant in such a sloppy, incompetent manner without shut-off so that the same froze on two different occasions causing damage to parts and requiring labor to the extent of more than $20.00 to make repairs and still there is no shut-off below the pavement in the proper position as meets the requirements of the ordi-

nances of the City of Anchorage, and the plans and specifications.

g. Inserted a charge of $500.00 and attempted to collect the same for changing a steel beam that holds the marquee, that plaintiff contracted and agreed to install in the regular contract, plans and specifications.

h. Failed to furnish and install outlet plates on electrical contacts.

i. Failed to furnish solid brass cylinder locks on the front doors.

j. Failed to install push plates and kick plates on five (5) doors as per contract.

k. Failed to furnish, install and equip two-way swinging doors between the show room and the shop as provided in the contract.

l. Failed to furnish the installation of one heating unit, with motor.

m. Failed to install three (3) thermostats in the show room as provided for in the contract and specifications.

n. Failed to install two (2) additional thermostats in the shop.

o. Failed to mount and install door frames in lead, according to the terms of the contract.

p. Failed to finish the building on the outside and allowed projecting wires to extend and has left the wall rough and uneven.

q. Failed to finish the building on the inside in a workmanlike manner.

r. Installed and laid cement blocks in freezing weather without properly protecting the wall and allowed the mortar between the blocks to freeze and the wall is dangerous and apt to disintegrate.

s. Failed to insulate the water pipes, steam pipes, and sewer pipes as provided in the contract.

t. Failed and refused to take out, reinstall and refinish one section of the cement floor in the show room which was frozen during construction and is defective and will not stand.

u. Refused to correct a condition in the floor in the boiler room so that it would drain properly even though requested to do so.

v. Failed to replace cement blocks over rear windows in shop where mortar was frozen in installing them and had fallen out over and around the windows, leaving a dangerous condition and causing a waste of heat from within.

w. Failed to properly install all of the windows of the shop—same being still loose and improperly fitted.

x. Failed to put on one coat of red lead and two coats of aluminum paint on all steel used in the building, and that the red lead and one coat of aluminum paint was never furnished or put on the steel.

y. He attempted to make an extra charge for moving the steel beam over the electric door which

beam was set in the wrong place by the plaintiff and through no fault of the defendant, and said plaintiff has constantly demanded extra pay for correcting this error in installment by him.

z. The floor in the garage was carelessly, and negligently built so that it does not drain and the work in finishing the floor was not in a workmanlike manner, but is defective and causes large pools of water to stand on the floor following the time that vehicles with snow on them or water are brought into the garage.

aa. Failed to finish the walls in the men's restroom.

bb. Refused to allow credit for 77 cement blocks saved by change in the plans after installation of the south door of the garage, which blocks were of the value of 65¢ per block.

cc. Failed to install proper exhaust pipe with swivel of a manufacturer and recognized product according to the contract.

dd. Attempted to change and refused to remove from statement for extras, the doors leading to the show room as such doors were included in the original contract and the attempt to collect for these doors was arbitrarily, capricious and without any justifiable reason.

ee. Failed to furnish and properly install, doors with closing equipment on all outside construction as required by the contract.

ff. Failed to use heavy wire mesh in gas pump lanes as called for in the specifications.

gg. Attempted to and did insist on charging for extras for installing of a hoist which was included in the contract.

hh. Failed to install the mirrors in the rest rooms.

ii. Laid cement blocks in sub-zero weather without heat or enclosures in violation of the terms and specifications of the contract, and the mortar was frozen and is soft and of no benefit, and the blocks are loose and cause the building to become unsafe.

jj. Failed to finish the building at the specified time, to-wit: December 1, 1950, and dilatorily allowed the building to be unfinished until February 24, 1951, and then the building was not finished at all and has never been finished and this defendant is entitled to recover liquidated damages of $25.00 per day from December 1, 1950, to February 24, 1951, which amounts to $2,150.00, and is entitled to recover damages at the rate of $25.00 per day from February 23, 1951, to such time as the building is finished according to the terms of the contract.

kk. That by reason of the plaintiff's failure to comply with the terms of the contract, this answering defendant has been damaged by the plaintiff to the extent of $20,000.00.

Then the defendant prayed that the plaintiff take nothing and that said defendant recover $20,000.00 on his cross-complaint.

Evidence.

Burton E. Carr, the defendant in the Court below, always contended that the building was never finished and the evidence will show that the plaintiff himself admitted that the building was not finished according to the plans, specifications and contract. The plaintiff admitted that the wire mesh was not installed in the ramp in front of the garage (Tr. 104); that the cylinder type block partition was not installed (Tr. 106); that the compressor was not installed where it was intended to be; that he attempted to charge extra for the installing of the hoist (Tr. 109); he admitted receiving the demand to finish the contract, a copy of which is attached to defendant's answer and cross-complaint; he admitted he did nothing about complying with the contract after receiving the demand (Tr. 162); admitted he agreed to furnish a bond guaranteeing the compliance with the terms of the contract; admitted he did not furnish the bond; admitted he was required to install one globe and window light on the marquee; that he did not install them (Tr. 163); admitted it was his duty to see that it was done (Tr. 164); admitted he did not install the hydrant provided for in the contract (Tr. 164); admitted he did not install the kick plates and push plates (Tr. 168); admitted he did not install the three (3) additional thermostats in the show room as provided for in the contract (Tr. 171); did not install the two (2) additional thermostats in the shop (Tr. 172); did not finish the building outside and inside (Tr. 172); did not take out and

refinish the frozen cement of the floor in the show room (Tr. 173); did not replace the blocks over the rear windows in the shop; admitted he could see daylight out through some of the cracks (Tr. 174); admitted Mr. Carr had to have the Anchorage Installation Company install the air compressor (Tr. 180); admitted he refused to furnish the itemized statement of the payroll for February, 1952 (Tr. 188 and 189); admitted he did not put the hand railing on the stairs that went down into the basement (Tr. 190); admitted there should have been a hand railing there. (Tr. 190.)

Then Burton E. Carr, the cross-appellant here was called as a witness who identified checks paid (Tr. 211 and 212); testified as to the delay in getting into the building; testified he did nothing to cause a delay; did not waive the requirement for wire mesh in the driveway; told plaintiff nothing to indicate that he would waive it; that the contractor was to furnish everything—all the labor and materials except the steel on the grounds—that defendant never at any time agreed to furnish the wire mesh; never waived the necessity for using it, never heard of the plaintiff putting in an extra sack of cement in the concrete around the pumps; testified to the violation of the contract by pouring cement (Tr. 235); the shop floor is very uneven and when it is raining, the water seems to go everywhere except down the drain; there are dips in the floor and it takes a broom to sweep it off; the caps over the drains were defective (Tr. 235, 236 and 237); in the Winter when the snow is on,

the cars coming in with snow on them naturally put water on the floor and the men cannot work unless they use a broom (Tr. 238); that the plaintiff's attempt to charge him $500.00 that he did not authorize for doing work that is in the contract, plans and specifications (Tr. 239); never agreed to pay him $500.00 for the beam, it was in the original plan (Tr. 241); he never waived the requirement of furnishing the compliance bond (Tr. 245); he told him he must have the compliance bond. There was not any wire drop to the light in the 76 pump, and that one (1) light was out all the time. He asked the contractor a number of times about it and his answer was, it was up to the electrician, and did nothing about it. He did not install the light globe in the marquee, did not put in the window light, no wire was installed so the globe could be put in (Tr. 246, 247); there was a very bad crack all the way up in the front concrete wall where he left a piece of wood in the concrete, also where he connected this foundation, he did not do it strongly and it gave away and let the building down (Tr. 248); he was supposed to put the foundation wall around six (6) or seven (7) feet deep and he put it three (3) feet down and was asked about it and he said that was as good as if it was seven (7) feet or ten (10) feet down. He presented a piece of mortar which breaks up and is soft and stated you could just scrape it off with your fingers from the blocks, that you can grab hold of it and it breaks right off, the blocks are loose (Tr. 248, 249); failed to install the shut-off valve in front of the building to prevent

the freezing of the outside hydrant, installed it in such a sloppy and incompetent manner without the shut-off so that the same froze on two different occasions causing damage to parts, and requiring labor to the extent of more than $20.00 to make repairs, and there is still no shut-off valve below the pavement in the proper position to meet the requirements of the city ordinances of the City of Anchorage as required by the plans and specifications; this valve is put up above the concrete, and he was told at the time it would not work and he said he would guarantee it to never freeze, but it did freeze and broke the valve and Mr. Carr had to put on a new one (Tr. 250); contractor-plaintiff tried to collect $500.00 for installing a beam that was provided for in the contract and specifications and was sued for in this action; he failed to install outlet plates on electrical contacts (Tr. 251, 252); that all that were put on were done by Mr. Carr or his employees; the contractor failed to furnish solid brass cylinder locks in the front doors; Mr. Gothberg said they were not available and put on bathroom locks or back-door locks which were very cheap locks (Tr. 252); he left big holes in the front doors; Mr. Carr paid $45.00 for locks to put in and was given no credit therefor, the doors were left weak and patched and were thin in the first place, he failed to install push plates and kick plates on five (5) doors as per contract (Tr. 253); he failed to furnish, install and equip two-way swinging doors between the show room and the shop as provided for in the contract; failed to furnish and install one (1)

heating unit with motor (Tr. 254, 255); failed to install three (3) thermostats in the show room as provided for in the contract and specifications; failed to install two (2) additional thermostats in the shop (Tr. 256, 257); failed to mount and install the door frames in lead according to the terms of the contract, failed to finish the building on the outside and allowed projecting wires to extend, and left the wall rough and uneven (Tr. 258); he failed to finish the inside of the building, the walls are rough on the inside and it does not look good (Tr. 260); there are cracks in the building at the present time, several on the East wall running diagonally off the corners (Tr. 269); the red lead and one (1) coat of paint were left off, only one coat of paint was put on, and the steel is starting to rust; he told Mr. Gothberg about the condition and he promised to check into this rust, but did nothing (Tr. 293); the concrete floors are all uneven and have to be removed to be made satisfactory and the wiring inside is not finished on the walls, the ladies' and men's restroom walls called for finished carpentry work and they are ugly, block walls, unfinished (Tr. 294, 295); he failed to insulate the steam pipes and sewer pipes as provided in the contract and most of them are not insulated at all, none of the pipes were painted and the specifications call for painting the pipes before installation and none of them were painted; he failed to take out and reinstall a section of the cement in the show room which had frozen during construction, it is defective and will not stand (Tr. 297); many coats of paint have been put

on this bad cement floor by Carr trying to cover it up, but it is still too rough to hold any of the tile blocks that we were putting on there. The contractor refused to correct a condition in the floor of the boiler room so that it would drain. It was necessary to go in to the boiler room every so often to draw off the muddy water and had to clean the boiler regularly, all the water runs to the side of the stairway and there is at least 1½″ to 2″ of water in the boiler room. This was brought to the attention of the contractor many times (Tr. 297, 298); that the contractor refused to replace the cement blocks over the rear windows in the shop where the mortar was frozen in installing them and had fallen out over and around the windows leaving a dangerous condition and causing a waste of heat from within. You can stand there and look out through the walls of the building and see light through it. There are several places upstairs, if you look, you can see right through to the outside (Tr. 299); windows in the shop are still loose and improperly fitted, the bottom part of the windows wiggle back and forth (Tr. 300); he did not finish the walls in the men's restroom, refused to allow credit for seventy-seven (77) cement blocks at 65¢ per block. He hauled the blocks away, failed to install proper exhaust pipes with swivels of a manufactured and recognized product according to the contract and he put up a home-made deal which would break off and we have quit using it altogether (Tr. 302); tried to charge for and refused to take off of the statement, for extra doors leading to the show room, all of the

doors were included in the original contract, no justifiable reason was given for trying to make the extra charge. There was supposed to be a fire wall between the office and the other part of the building and he did not put in the block wall but used lumber, and that is where the doors are supposed to come in, and in that place the doors are just one-way doors and should have been swinging doors with all the proper hardware furnished which he never put on and the sliding door does not have the right hardware. Failed to furnish and install doors with closing equipment on all outside construction (Tr. 303); claimed he could not get the hardware and said he would put in something temporary, but never did fix them. Attempted to and did insist on charging extra for installing a hoist which was included in the contract, the identical same hoist was ordered before Mr. Gothberg signed the contract, the specifications were shown to him (Tr. 304). Failed to finish the building at the specified time, to-wit: December 1, 1950 (Tr. 305); it was around March when we were able to open (Tr. 306); had to install the washmobile ourselves and assemble it, Gothberg was supposed to assemble it and we paid $175.00 extra for the plumbing part of it; that the railing could have been put in on the stairway in due time (Tr. 306); water stands in the furnace room until it is swept out, water stands in the shop here and there, where the men are working, and practically everywhere on the floor except over the drain; you have to keep sweeping it all the time (Tr. 371-373);

Mr. Carr further testified that the front foundation wall was only down in the earth about 1½ feet (Tr. 403); that Mr. Gothberg did not furnish the door for the garage as originally ordered (Tr. 412); that Mr. Gothberg billed Mr. Carr for relocating the pumps the second time therefore making a double charge for the extra work (Tr. 431); he had to pay $80.96 for eleven (11) pieces of asbestos board that Mr. Gothberg should have put in the firewall, but was put in and paid by Mr. Carr (Tr. 437);

Then Mr. Charles E. Wyke was called as a witness (Tr. 451), and he testified that he worked for Mr. Gothberg on the job approximately three (3) months, the weather was getting very cold (Tr. 452); he testified that he worked alongside the men and several times they walked off the job in disgust because they did not want to do a bad job—sometimes they would not show up for two or three days because they did not want to lay blocks when it was so cold, as soon as they would put their trowels in the mortar, and touch it to the blocks, as a general rule the mortar froze immediately (Tr. 457); he testified that he would say four out of five times the mortar will disintegrate if it becomes frozen and it turns to powder and gets powdery and blocks can be readily jarred loose (Tr. 459); he testified that he took his knife and scraped through the paint on the heads of the bolts and rivets to see if there was any red lead on them and the heads were black and he could find no red lead on them at all (Tr. 461); the concrete around the windows looks like it had been frozen, the concrete floors

are flaking off and peeling around the front. He testified that he figured all the extra work that was done by Mr. Gothberg, including concrete walls, show room and office and whatever was done there, including the partition, including the balcony, and arrived at an estimate that the extra work done by Mr. Gothberg could be easily done for $2,750.00, and that he was giving him around $250.00 or $300.00, the best at that (Tr. 463, 464); he further testified that the mortar froze immediately as soon as it got on the blocks and was in a semi-state of being frozen before the block was laid and was frozen enough that it would not bind the blocks. (Tr. 475.)

Then Victor C. Rivers was called and testified he was a registered and professional engineer, had been practicing twenty-one (21) years, all of that time in Alaska; that he inspected the building, that very little cleaning up work had been done and that there was a considerable amount of debris at the South end of the building; that the plans and specifications provided for the contractor to clean it up; the work was not complete; the specifications called for a grade of the floors of 3/16 inch to the foot toward the drain; there were bad depressions in the floor some as much as ½ to ¾ of an inch which were full of water and which instead of draining to the floor drain at particular points, the grade was evidently in the opposite direction, the floor in the boiler room is low at the stairs and grades away from the drain about 1½", it is lower than where it should drain; there is about 1½ inches of grade differential in the wrong direc-

tion, it would never drain if left alone, the water would remain there until taken away or until evaporated. Along the front wall of the show room there is evidence of faulty concrete which has been painted over, but is scaling off in a number of places; it could have been caused by the grade of concrete used or the freezing (Tr. 504, 505); there are trowel marks and uneven places over the greater portion of that floor and very roughly finished job and is not finished in accordance with proper grade or proper quality of workmanship; the floor should be refinished, there are two or three ways it could be done, the top two or three inches of the floor could be removed and refinished with concrete and have it drain toward the drains that would have to be done with machinery such as a compressor and jackhammer or regular crushing machinery, and it is very expensive work; the floor in the show room shows trowel marks, rough finish and it is now painted and has a tendency to make it look smoother, but there are imperfections especially along the front windows. He went over the structural steel, scraping it with his pocket knife and found it to have the manufacturer's priming on the steel and what appeared to be on microscopic examination, one coat of aluminum paint and no evidence shown with the pocket glass of any other layers of aluminum paint. He inspected some of the bolts, rivets and welds, and checked five connections of this nature and scratched them and found no evidence of red lead or any other rust resistant primer on the connections. There appeared to be one coat of alumi-

num paint (Tr. 507); he testified that he examined the mortar used in the masonry and it had the appearance of having been frozen; that the mortar was what is known as lime mortar and the specifications called for a one to three, cement-sand mortar, and evidently a larger percentage of lime was used (Tr. 509);

The blocks over the windows in the South wall should be removed and replaced with proper standard of workmanship. The heat is lost there. The specifications provided for builders hardware of brass, and I found the hardware in the outside doors to be brass-plated steel hardware, including the door closers, which are already showing signs of rust and deterioration. It is installed loose, not a good fit and not up to acceptable standards. There was to be kick plates and push plates on the doors on both sides—there are kick plates only on one side of each door, and no push plates at all. The inside door hardware on three (3) different doors connecting the garage to the show room is not as specified. The hardware called for two (2) of those doors to be on over-head tracks and roll-away—there is no such hardware there. The locks and knobs and latches are very loose, they are bedroom-type hardware, not front entrance hardware, and they are not in accordance with the specifications, and not of acceptable standards (Tr. 510-512); the plate glass appears to be of uniform size but does not fit the openings and in two (2) places along one side there is a substantial crack, from nothing to ⅛ of an inch, with wooden shims to keep it from falling out. The metal sash installed has many hammer and tool

marks on it and they have used a small nail around the inside, just ordinary steel nails which have now rusted. It is very poor workmanship; does not fit the openings and not an accepted standard of material and some of the stops inside have not yet been installed and they are missing (Tr. 513); the industrial sash around the South and East walls of the building are not fitted, the openings vary in size, and the sash themselves are loose, and they have been corked with plastic corking which was very poorly put on, and is a very sloppy job below acceptable standards of workmanship (Tr. 516); the specifications call for hot and cold water pipes to have a coat of paint and then be insulated in their entirety. The cold water pipes were not painted and are not insulated and approximately one-half of the hot water pipes have been poorly covered with insulation. Neither of the pipes have been painted (Tr. 517); the floor could be fixed for about $1.00 a square foot—about $5,000.00 total (Tr. 519, 520); the boiler room could be fixed for approximately $125.00 to $150.00 (Tr. 524); it will cost to remove the old blocks in the walls and put in new blocks or replace the existing blocks, about $3.00 per square foot (Tr. 525); the mortar does not have the strength of a cement mortar. (Tr. 527.)

On Cross-Examination.

He further testified that on his first visit "there were puddles on the floor as deep as ¾ths of an inch, about as big as that second table in front of you, and a number of depressions at another location under

the hoist where there is a considerable depression—noticed that as well'' (Tr. 533-534). If he owned the garage, he would not accept the floor, from somebody building it, without they replaced the floor, to a standard that was acceptable. (Tr. 536.) To fix a part of the basement it would cost around $150.00 for excavation, approximately $50.00 for backfill and also extension of the walls of the basement (Tr. 540-542); he estimated the cost of building boiler room and stair rail at $2,186.00 (Tr. 547); the exhaust pipe connections were not considered adequate for the purposes. (Tr. 570.)

ARGUMENT AND AUTHORITIES.

We have set forth in this brief, sufficient evidence to impart to you the facts, or a part of the facts, upon which we based our motion for judgment against the plaintiff notwithstanding the verdict of the jury—in other words, to either sustain our motion to dismiss the plaintiff's cause of action or to instruct the jury to render a judgment for the defendant against the plaintiff on the plaintiff's complaint, and our contention then and now, was and is, the original complaint alleged a compliance with the terms of the contract which by the very wording did mean a literal compliance and then over our objection, the Court permitted the plaintiff to amend the pleading to plead a substantial compliance and by the plaintiff amending, to plead substantial compliance, the trial court overruled the defendant's motion to dismiss the plain-

tiff's complaint and amended complaint; and also overruled the defendant's motion to instruct the jury to return a verdict for the defendant on the plaintiff's complaint at the close of all the evidence. These motions were made at the close of plaintiff's evidence, and at the close of all of the evidence, then the Court further overruled the defendant's motion for judgment notwithstanding the verdict, after the jury had returned its verdict to the Court. All of this was based upon the fact that there was neither a literal compliance with the contract nor a substantial compliance with the contract. Therefore the plaintiff could not possibly contend performance with the contract that admittedly he did not perform, and the defendant not having done anything to prevent its being performed, by the truth, and in fact, all the way through the evidence shows the defendant, Burton E. Carr, was trying his best to get the plaintiff, Victor Gothberg, to comply with the contract.

It will also be noted by the record that the trial Court did not properly instruct the jury on the definition of substantial performance, and denied the defendant the right to submit to the jury, the definition of substantial performance from Black's Law Dictionary.

It will also be noted that the defendant moved the Court to require the plaintiff to elect whether he would proceed on the contract or whether he would proceed on the theory of quantum meruit, and this motion was also overruled. At the close of all of the

evidence, the defendant's offered Instruction No. 1, after omitting the captain, reads as follows, to-wit:

> "You are instructed that the Plaintiff has failed to make out a cause of action against the defendant, Burton E. Carr, in favor of the Plaintiff, on his First Cause of Action; and
>
> On his Second Cause of Action; and
>
> On his Third Cause of Action; and
>
> On his Fourth Cause of Action; and
>
> On his Fifth Cause of Action; and,
>
> You are instructed to find in favor of the Defendant, Burton E. Carr, and against the Plaintiff on said causes of action."

and we are briefing our cross-appeal on the theory, that, of all the evidence most favorable to the plaintiff, there was no evidence to sustain either of his contentions of literal performance, or substantial performance, and before he would be entitled to a judgment for any sum, it was his duty to prove either literal or substantial performance and by the Court's submitting the plaintiff's case to the jury over the objections of the defendant, and the Court's failure to render judgment notwithstanding the verdict was error, and that said motion should have been sustained. On this question, we submit the following:

CASES AND ARGUMENT.

In examining cases pertaining to our contention that the appellee-appellant, Mr. Carr, as a matter of law should have had a directed verdict in his favor in this case, because there is not sufficient evidence that there had been either strict performance or substantial compliance of the contract, on which the appellant-appellee, Mr. Gothberg sues, we find first in the case of *Anderson et al v. Todd,* 77 N.W. 599, Supreme Court of N. Dakota, 1898, where the trial Court determined that there has been substantial compliance with the contract. Upon examining the facts, the Supreme Court of North Dakota reversed the decision of the trial Court. The defendant was desirous of erecting a two-story building on a lot owned by him. The price for erecting said building was to be $6,000.00, with payments made every 14 days. The evidence showed that there was no foundation under the front portion of the building as the contract required. The plaintiff alleged that he had performed the contract. The defendant answered this allegation stating that the work was done in an unskillful and careless manner and that the defendant had used defective and improper material. After discussing the doctrine of recovery under the theory of substantial performance in contracts, the Court went on to say on page 600:

> "But the doctrine does not go to the extent of compelling a person to pay the contract price for a building differing in important particulars from that for which he has contracted. The defendant

had a right to use his own judgment as to the kind of material to be used in this structure, and his own taste to fix the style of its architecture. All the details were set out fully in the written specifications and contract. This contract governs their rights. Upon its performance the defendant had agreed to pay the contract price, and by a performance of its obligations, as a condition precedent, the plaintiffs are enabled to compel payment of the contract price, and in that way only. The language of the court in Smith v. Gugerty, 4 Bar. 614, which was an action on a building contract, further illustrates what we have said: '* * * Parties should undoubtedly be exact in the fulfillment of their agreements, even to the smallest particulars; and, if they willfully or carelessly depart from any one of them, they should incur the penalty however severe it may be.' * * * In this case the facts do not bring the Plaintiffs under the protection afforded to those who have not fully, but have substantially performed their contract. The plans and specifications were in writing, and were for Plaintiffs' guidance. It is plain they did not follow them in the particulars already noted. These deviations and omissions were, in our judgment, neither slight, unintentional, innocent, nor easily remedied."

Undoubtedly from examining the evidence in the *Anderson* case, and the evidence in the case at bar, we see that the plaintiff has both willfully and carelessly failed to perform his duty in erecting this building. Through the testimony of Mr. Carr, appellee-appellant, and the testimony of Mr. Gothberg, appellant-

appellee, and the testimony of Mr. Rivers, engineer, witness for Mr. Carr, evidence has been brought out of a flood of departures from the original terms of the contract and of unskillful work done on the building.

In the case of *Rockland Poultry Co. v. Anderson,* 91 A. (2d) 478, Supreme Judicial Court of Maine, 1952, concerning a contract for the construction of a building to be used by a poultry farmer for the storage of metal cages containing live chickens. Here the plaintiff sued the defendant contractor, because the contractor had not constructed the building satisfactorily. He alleged that the foundation was not sufficient; that it was weak and faulty and had sagged and settled; that the floor had cracked and the walls settled. On page 480, the Court said:

> "A careful examination of the record convinces the Court that this claim of the plaintiff is correct. The jury verdict for the defendant is plainly wrong. The damages may not be large, as the plaintiff states in its brief, but the plaintiff is entitled to something for improper construction of the floor under the terms of the contract, which is proved by the admissions of the defendant, to the effect that the floor is not the good and substantial one he promised. There is no conflicting evidence on that point, for the defendant admits liability in an amount sufficient to make the floor 'good, strong, and substantial' as the contract required. The contract provided for a good building with 'ample and sufficient foundations', and the evidence does not show that to build such a floor was impossible. The defendant's expert witness stated that to build in that

> building a good floor 'you would have to excavate four or five feet'. It might be difficult but it was not impossible. It might cost the contractor more than he expected, but he was bound by his contract.
>
> Where a construction contract provides that a certain thing be done in a certain manner, or to obtain a certain result, it must be done by the contracting party if it is not impossible, and if it is not prevented by act of God or of the other party. There must be 'substantial performance.' "

In the case of *White et al. v. Mitchell et al.,* 213 Pac. 10, Supreme Court of Washington, 1923, where the plaintiff's two sisters contracted with the defendant for the building of a house. The price of building was to be somewhat less than $4,000.00. Payment was to be made as the work progressed. The testimony showed conclusively that the material used in the construction of the house was such as the contract provided, but the evidence also showed that when the contractor-defendant turned the house over to the plaintiff, there were at least four defects, as follows:

> "First, there was some poor work which resulted in some of the windows and doors not being properly constructed; the septic tank not being in accordance with the agreement, and other minor defects, all of which for a reasonably small sum could be remedied. Second, the southwest corner of the house was some three or four inches lower than other portions of the house. Third, the lower floor of the house was generally uneven and materially out of level. * * * Fourth, the hardwood and

interior finish had become soft, raised, uneven, and colored to a material extent."

The Court then said on page 12, laying down the rules of law concerning compliance with the terms of a contract in relation to this case:

"Undoubtedly, by their contract, the respondents impliedly, if not expressly, agreed to construct the house in a reasonably good and workmanlike manner. The mere fact that the ground was soft would not excuse them from the performance of their contract in a proper manner, unless it was of such character it would be impossible to construct a foundation upon it. For all that appears, a wider footing for the concrete basement would have prevented the foundation from sinking. The general rule is that a builder must substantially perform his contract according to its terms, and, in the absence of a contract governing the matter, he will be excused only by acts of God, impossibility of performance, or acts of the other party to the contract, preventing performance. If he wishes to protect himself against the hazards of the soil, the weather, labor, or other uncertain contingencies, he must do so by his contract."

In the case of *Superintendent and Trustees of Public Schools v. Bennett,* 27 N.J. Law, 513, 72 Am. Dec. 373, the Court said:

"* * * If a party, for sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials and do all the labor, he must erect and complete it, because he has agreed to do so. No matter what

the expense, he must provide such substruction as will sustain the building upon that spot until it is complete and delivered to the owner."

"Under the doctrine of these cases, and others like them, which might be cited, it was the duty of the respondent to construct the house in accordance with the plans and specifications, and they cannot be excused therefrom because of defects in the soil or unfavorable weather conditions."

On Page 13, the Court further said:

"Where the builder has substantially complied with his contract, the measure of damage to the owner would be what it would cost to complete the structure as contemplated by the contract. There is a substantial performance of a contract to construct a building where the variations from the specifications or contract are inadvertent and unimportant and may be remedied at relatively small expense and without material change of the building; but where it is necessary, in order to make the building comply with the contract, that the structure, in whole or in material part, must be changed, or there will be damage to parts of the building, or the expense of such repair will be great, *then it cannot be said that there has been a substantial performance of the contract.*"

In the case of *Dorrance et al. v. Barber & Co. Inc.*, 262 F. 489, Circuit Court of Appeals, Second Circuit, 1919, the following definition of substantial performance was laid down:

"Substantial performance, as that phrase is correctly used, means not doing the exact thing promised, but doing something else that is just

> as good, or good enough for both obligor and obligee; and courts and juries say what is good enough or just as good."

It is noted that if you apply this definition to the case at hand, the appellant-appellee, Mr. Gothberg, did not perform a job just as good as was contracted for, or good enough for both the obligor and the obligee.

In the case of *Turner v. Henning,* 262 F. 637, Court of Appeals of District Columbia, 1920, where the plaintiff-contractor obtained a mechanic's lien against the defendant's dwelling house, which plaintiff had constructed. The testimony showed that the specifications called for a concrete floor in the cellar consisting of a 1″ top and a 3″ base making 4″ in all. But the floor as laid did not have a 1″ top, but measured from 1½″ to 2½″ in total thickness. Using a little pressure with a pick, the surface of the floor could be punctured. Other evidence of defects in construction was also introduced. The Court said the plaintiff was not entitled to recover under the doctrine of substantial performance and the Court laid down the doctrine as follows, on page 638:

> "That doctrine—'is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omis-

sion or departure from the terms of his contract.' ''

Gillespie, etc. v. Wilson, 123 Pa. 19, 16 Atl. 36.

This case resembles our own case here to a great extent. Although it is our opinion that the appellee-appellant, Mr. Carr, in our case introduced much more evidence of defects in performance of the contract, in several instances a total failure of compliance and a stronger set of facts than were set out in the case cited just above.

In the case of *Spence v. Ham,* 57 N.E. 412, Court of Appeals of New York, 1900, this case was tried before a referee in the lower Court. The referee found that there were slight omissions and deviations in the performance of the contract, by the plaintiff-contractor, but such omissions and deviations were not willful or intentional; he stated that such omissions and deviations did not prevent substantial performance of the contract. The contractor failed to have the girders of certain lengths as specified by the contract; failed to have trimmers and headers double instead of single; failed to put drawers and shelves in the closets; failed to put wooden partitions on a brick wall in the basement; and there were other small deviations. The Court said in order to recover *at all,* the contractor must either show full performance or substantial performance. Upon showing full performance he can recover the contract price; but, upon showing substantial performance, he can only

recover for the work that was done. The Court further said that where the omissions and deviations are slight and unintentional, recovery will be allowed, because otherwise a hardship might be done. It was further stated that substantial performance depends somewhat upon the good faith of the contractor. If he has intended or tried to comply with the contract and has succeeded except as to some slight omissions and deviations, he will be allowed to recover the contract price, less the amount necessary to complete the contract.

In the case of *Herdal v. Sheehy,* 159 P. 422, Supreme Court of California, 1916, here the facts were: The defendant contracted with the plaintiff's assignors to build a house on defendant's property, for $3,565.00, payable in four installments. All of the contract price was paid except $660.00. A lien for this amount was filed by the plaintiff's assignors. In performing the contract, the contractor placed the building partially upon public property. Here the Court held that there was not substantial compliance with the contract by the contractor erecting the house, and the contractor's assignees could not, therefore, collect the contract for the construction of the building.

In the case of *Nance v. Peterson Bldg. Co.,* 131 S.W. Rep. 484, 1910, a contractor contracted to build a house for $2,800.00—$100.00 to be paid in installments. The house was to be a duplicate of a certain house built in another town in Kentucky.

The evidence showed that the house was not completed by the date named in the contract. The foundation of the house was different than the one called for in the contract. The doors and windows were different than the ones specified in the contract. The cement construction in the cellar was defective and faulty. The house did not have suitable sewerage or drainage pipes to carry the water from the bathroom and sinks. Some of the concrete work in the cellar became cracked from faulty workmanship and there was other evidence of defects in the construction of the house.

The Court instructed the jury that if the house was built substantially as provided for in the contract there was sufficient performance. The case held that the facts stated did not authorize such an instruction. It is shown by the evidence there was not substantial performance of the contract. The Court stated further at page 485:

> "As defining the phrase 'substantial compliance' The Court told the jury: 'Substantial compliance and performance, as used in instructions 1 and 2, permit only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remedial without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deduction from the contract price.'
>
> To recover the purchase price from her, it must have tendered the structure as agreed. Trivial

departures in executing the work would not have excused appellant from accepting. And where the evidence is such as to leave it in doubt, or to be determined from conflicting evidence whether the performance of the contract was substantial, and whether any departure was material or merely trivial and inconsequential, is for the jury, who determine the fact by the standard of their own common sense and experience. It must always be born in mind that neither the jury nor the court are at liberty to make a contract for the parties, or to alter the one already made. Therefore, although the jury or the court may think that the house as built is equivalent in value or utility to the one contracted for, they are not at liberty to suffer the substitution on that score."

In the case of *Golwitzer et al. v. Hummel,* 206 N.W. Rep. 254, the facts were that a contract was entered into whereby a house was to be built for the appellant.

The contractor was to furnish all the materials and labor except the furnace and installation of the same and all the plumbing fixtures. The house was to be given two coats of paint outside and to be shingled with red fireproof shingles on the roof. The dining room and living room were to have 3/8" clear flooring. All other rooms were to have good grade yellow pine flooring. The interior was to be finished in clear yellow pine and the bathroom was to be white enamelled. The contractor was to receive $4,000.00 when the house was completed together with an old house and barn.

The payments were to be made as follows: $1,000.00 when the basement was completed and the lumber on the ground sufficient to complete the rough construction; $1,000.00 when the rough construction was completed; $1,000.00 when the plaster was finished and $1,000.00 when the building was finished. The basement was to be cemented with drain. All the work and materials were to be first class and the building was to be built according to plans attached to and made a part of the contract.

The appellant objected to paying the third payment. Their objections grew out of claims of defective work. The evidence pertaining to construction of building showed that the cement mixture for the foundation and basement was not a good mixture. The basement was to slope to a given point for drainage purposes, but a large part of the floor did not drain to this point. The front porch roof was defective. The porch pillars were too small and were not plumbed. The roof of the house leaked and sagged. In some instances there was no paper under the shingles as the contract called for and the laying of the shingles was irregular at places. The windows in the attic were immovable. The furnace was not located in the place indicated in the plans.

The contractor alleged that there was substantial performance of the contract.

The Court said at page 256, pertaining to these facts, as follows:

"* * * but we do not deem this case one for the application of that doctrine. The variance from the original contract is such that it rather tends to show a willful purpose to make as cheap a job as possible out of this. More than this, in the written contract there was a provision that all work and material were to be first class. Suffice to say that the appellees did not live up to this provision. Taking it all in all, we reach the conclusion that the appellees were not entitled to recover herein, and the District Court should have so held."

In the case of *Cohen et al. v. Eggers et ux., Same v. Breden et ux.,* 220 N.Y. Supp., 109—1927, there the trial Court found that the plaintiff contractor did not perform the mixing and laying of cement for the cellars of two houses in accordance with specifications resulting in disintegration of the finished work. There were other defects also found by the trial Court such as roof of the houses leaked badly, there was not any sheet rock installed in the garages as was called for by the specifications, and the failure to put concrete pillars under the porch as was specified under the contract. The Court said pertaining to these facts, even a slight deviation from the specifications presents a close question as to whether the plaintiff had performed under his contract to which he is entitled and the Court further said that the deviation stated in this case amounted to a substantial deviation from the terms of the contract therefore

there could be no recovering by the plaintiff against the defendant under this contract.

In the case of *Brainard v. Ten Eyck,* 168 N.Y. Sup. 116—1917, there the plaintiff and contractor brought an action against the defendant to recover $1,276.95. The defendant alleged failure to perform the contract on the part of the plaintiff, and claimed damages for $1,000.00. The contract price was $5,329.00, $4,180.90 had already been paid by the defendant to the plaintiff for work performed. The jury rendered a verdict for the plaintiff in the amount of $1,000.00. The defendant moved to set aside the verdict on the grounds there were omissions and defects in the structure of the building and therefore not substantial performance. The defects found by the Court were as follows: Failure to construct trimmer beams, defective construction of back stairway, cutting away a bearing beam for the insertion of pipes, failure to connect the gutters on the house with the street sewers, lack of double beams over the partitions. The Court said, there does not seem to be substantial performance of the contract as would require the defendant to pay the contract price, less small deductions, for unsubstantial and minor defects. Unless the contract was substantially complied with the plaintiff cannot recover under the law.

In the case of *North American Wall Paper Co. v. Jackson Construction Co. Inc., et al.,* (No. 7129) 153 N.Y. Sup. 204—1915, in an action to foreclose a

mechanic's lien, the contract provided that the plaintiff's assignors should do all the work for the gross sum of $3,200.00. The sum of $2,150.00 was paid on account. This lien was for the balance left unpaid. The principal question raised by the defendant was, that there was no substantial performance of the contract. The principal question litigated on the trial was regarding the performance of plaintiff's assignors with respect to varnishing the floors, enameling the dadoes and tubs in the bathrooms, and painting the bathrooms, kitchens and bedrooms. Plaintiff claimed full performance of the contract. The trial Court found that the plaintiff had substantially performed the contract.

This Court of Appeals said, "there is limited application of the rule of substantial performance, and a party who knowingly and willfully fails to perform his contract in any respects or omits to perform a substantial part of it, cannot be permitted under this rule to recover the value of the work done."

In the case of *Knutson v. Lasher et al.,* 18 N.W. Rep. 2d 688—1945, states as follows, on the doctrine of substantial performance, on page 695:

> "The doctrine of substantial performance, under which Plaintiff claims he is entitled to recover, does not confer on a contractor any right to deviate from the contract or to substitute what he may think is just as good as what the contract calls for. *Where the deviation is willful, the contractor is not entitled to recover at all.* It is only

where the deviations and defects are unintentional and not so extensive as to prevent the owner from getting substantially what he bargained for that the contractor is entitled to recover under the doctrine mentioned. *After all, the owner has the right to specify what he wants and to obligate himself by contract to pay only for what he specifies.* (Emphasis ours.)

SUMMARY.

Now in summing up—after reading a lengthy transcript and reading a great number of cases on the doctrine of substantial performance, I think there is ample evidence of willful, careless and negligent departure from the terms of the contract, to prevent the plaintiff from recovering anything at all. It could not be doubted also that the great weight of the evidence shows that the appellant-appellee, Gothberg, failed to install a substantial amount of the materials required and failed to perform much of the labor contracted for under the terms of the contract and specifications, and much of the work done by him was so defective, in nature, that it is of no value to Mr. Carr as shown by the evidence that to fix the floors alone, will cost $5,000.00, and the walls must be relaid and a great portion of the work done over; that the amount of $34,672.57 paid to the plaintiff by the defendant, Burton E. Carr, plus all of the obligations paid for the plaintiff by Mr. Carr, amounting to thousands of dollars have amply paid the plain-

tiff and overpaid him $8,131.63, as found by the verdict of the jury which verdict was returned with the other verdict which was for the plaintiff, on the theory set forth in the trial Court's erroneous instructions on the theory that substantial compliance had been proven.

We most respectfully contend that on our cross-appeal that this Court should reverse the trial Court's holding of substantial compliance on the part of the plaintiff and uphold our motion to dismiss the plaintiff's complaint, all as shown by the record herein and should uphold the verdict awarding Burton E. Carr, $8,131.63, as awarded for breaching and non-performance of the contract.

We will now endeavor to answer appellant Gothberg's brief:

ANSWER TO BRIEF OF APPELLANT VICTOR GOTHBERG.

We feel it would be unfair to the Court to make another statement of fact here since we have done so in the brief above and will only resort, if at all, to statements of fact where it becomes necessary to answer the appellant's argument.

ANSWER TO ARGUMENT NO. I.

In this assignment, appellant Gothberg contends that the Honorable Anthony J. Dimond, late district judge, of our Third District, erred in not instruct-

ing the jury to return a verdict on his first, second and fifth causes of action. We can see no merit whatsoever in this contention, there was a flood of evidence in contradiction of the plaintiff's right of recovery on these three causes of action therefore we feel that our argument in support of Burton E. Carr's motion for an instructed verdict against the plaintiff, Victor Gothberg, as set out above, completely answers this part of the brief and will not burden the Court with further argument or further citations. The whole case was tried and a question of fact arose on every cause of action of the plaintiff. It will be noticed in the evidence that there was considerable controversy over the improper cutting off of the foundation and rebuilding of a portion thereof, covered by the first cause of action, and there is positive and undisputed evidence that thousands of dollars were paid to the plaintiff by the defendant Burton E. Carr after the crude, unfinished job had been done by the plaintiff which is set forth in the plaintiff's cause of action No. I. The same situation exists as to the cause of action No. II, which was controverted in every particular and therefore became a question of fact for the jury and as to the fifth cause of action, the testimony shows practically a complete failure of performance on the part of the plaintiff contractor, Gothberg, on the matters referred to in said cause of action. However, the undisputed evidence shows that the contractor was paid for the work he did, the sum of $34,672.57, which far more than compensated him for any work performed or materials furnished

by him and in the opinion of the defendant, Burton E. Carr, overpaid Mr. Gothberg many thousands of dollars for the improper, sloppy, half-performed contract and even the plaintiff, Victor Gothberg, admitted in his testimony that he did not finish the building according to the plans, specifications; and contract; admitted that the wire mesh was not installed in the ramp, that the cylinder type block partition (fire wall) was never installed, that the compressor was never installed, that he attempted to collect extra for installing the hoist, admitted that he received a demand to finish the contract, a copy of which was set forth and attached to the cross-complaint and was set out above. In this written demand and request for the contractor to finish the job, there are 37 direct requests for the contractor to do to comply with the terms of his contract, and the contractor ignored the requests and demands, and filed suit instead, alleging substantial compliance with the contract, and the statement of fact above set forth clarifies in our opinion the issues joined along that line. Just two of the contentions—that is the floors and the walls of the garage, will require the outlay of thousands of dollars to make them usable and actually safe and a workmanlike job as contracted for, and those two alone, the east wall and the south wall will cost more than $2,000.00 to fix and the front wall which is concrete and glass, the testimony shows that the contractor left a tamping stick (wood) in the forms when the wall was poured and that there is a large crack in the wall at this place, and the costs

of the fixing of the concrete floor would be $5,000.00. Therefore, two items alone amount to more than the jury allowed the defendant as a reduction against the judgment found for the plaintiff and in truth and in fact the jury was far too liberal with the plaintiff. However, the Hon. Anthony J. Dimond, adopted the findings of the jury—one of which was unquestionably that the plaintiff, Gothberg, never complied with the terms of the contract not even substantially because he allowed the defendant a judgment over and against the plaintiff to be offset against his judgment to the extent of $8,131.63, and did allow the plaintiff $6,119.19, and the said plaintiff having previously received $34,672.57; makes a total that he would receive all together of $40,791.76, for butchering up and failing to comply with a contract wherein he agreed to do, in a first-class workmanlike manner, for the sum of $38,450.00. Even if he had performed all of the work in a workmanlike manner, in accordance with the terms of the contract, and had performed the actual extras that Mr. Carr admitted were extras, the $40,791.76 plus all of the plaintiff's bills, paid by Mr. Carr, would have paid him adequately for a finished, good, respectable job and the evidence all shows that he failed to perform such services or finish the job therefore in our humble opinion, there is no merit in Argument No. I.

ANSWER TO ARGUMENT NOS. II AND III.

The same applies to Argument No. II as applies to Argument No. I. The first contract was never fully performed according to the terms thereof as shown by the testimony set out in our brief above. Foundation was defective, the boiler room floor was defective, and many other noted defects are mentioned in the testimony. This point No. II challenges the Court's ruling denying appellant's motion to dismiss the appellee's cross-complaint. The testimony was strong in support of appellee Burton E. Carr's cross-complaint and the Court and jury each believed in the merit thereof and the jury rendered a judgment on the cross-complaint for more than $8,000.00, and the late Hon. Anthony J. Dimond, district judge, sustained it and rendered judgment thereon. Thus we contend the argument unreasonable.

As to Argument No. III, it is quite apparent that the jury felt justified in rendering judgment for the plaintiff and allowed a definite sum of money; then allowed the defendant a judgment for a definite sum of money to be deducted from the amount rendered in favor of the plaintiff, and the Honorable Anthony J. Dimond made the deduction and entered judgment in compliance therewith.

All of the statements on paragraphs VIII, IX, and XI, were arguments that were made to the jury or similar to the arguments made to the jury, and the jury having full and complete information before it determined the questions as shown by the record.

We wish to call your attention to this man Anderson, whom the plaintiff, Gothberg, brought to Mr. Carr to get Mr. Carr to employ him as an architect on the job and Mr. Carr testified that Gothberg recommended him, that Gothberg brought him to Mr. Carr's home, that he paid Anderson & Smith, $2,700.00; that Anderson agreed to be on the job every day until the job was completed and if he could not be there, he would have a man there to represent him. (Tr. 324.)

All the way through the evidence, it is quite apparent that Mr. Anderson was looking out for the interest of Mr. Gothberg and not for Mr. Carr. He even wrote a letter directing work to be done when he knew that the particular work had already been performed and there were other tricks all the way through indicating a conspiracy between Mr. Gothberg and Mr. Anderson, therefore, I trust that the Court will look upon Mr. Anderson's testimony with caution as the Trial Court and jury must have done.

We, in our humble opinion, believe that the proof on the cross-complaint of Burton E. Carr was more than adequate and that the verdict of the jury was lesser than the amount clearly proven by the weight of the evidence, however, we were required by law to accept the verdict as rendered.

The case of *Lease v. Corvallis Sand & Gravel Co.*, 185 Fed. 2d 570, is cited by appellant. We have tried to analyze this case, and we cannot find anything about the case that would support the contention of the Ap-

pellant Gothberg. This was a suit for furnishing some additional concrete and the trial judge found in favor of the plaintiff and the Ninth Circuit Court of Appeals, acting through the Hon. Justice Pope, wrote the opinion which was concurred in by Justices Matthews & Healy.

While the law stated therein seems to be, in our opinion, correct, in every way, it does not apply to the case at bar at all. The cross-complaint in this case was supported by evidence of various kinds and was supported also by expert testimony of an engineer whose integrity and ability have never been questioned so far as we know in any way, and a man of outstanding reputation in Alaska, Victor C. Rivers, as well as the fact that the jury, by agreement of counsel, were allowed to view the premises, and did view and see the premises in their entirety, under the custody of the bailiff and every scintilla of the cross-complaint was sustained by competent evidence.

Therefore, it would have been error for the judge to dismiss the cross-complaint and his refusal to sustain the motion to dismiss was in our opinion a correct ruling.

ANSWER TO ARGUMENT NO. IV.

The motion of the appellant for judgment notwithstanding the verdicts or in the alternative, for a new trial, for the reason that the verdicts are inconsistent and that the verdict No. 1 is contrary to the evidence,

and that verdict No. 2 is inconsistent with verdict No. 1, we feel that the rule set forth in the appellant's brief is more favorable to the sustaining of the judgment than it is against the judgment especially wherein it is stated "the verdict must be certain enough to enable the Court to reduce it to form, if informal and consistent in its several awards and findings * * * the verdict should follow and conform to the instructions, even if erroneous and disregard for them, is grounds for a new trial or reversal *unless it can be said that no prejudice resulted.*"

At the close of the instruction (Tr. 760), the trial judge made this statement:

> "If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked 'Verdict No. 1' *the sum which you find that the Plaintiff is entitled to recover of and from the defendant* and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict."
>
> "Similarly, if you find that the plaintiff is not entitled to recover any sum whatever against the defendant, and that the defendant is entitled to recover from the plaintiff, *you will (740) insert in the form of verdict which has been prepared for that contingency and which is marked 'Verdict No. 2', the amount which you find the defendant is entitled to recover from the plaintiff* and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict." (Emphasis ours.)

You will note the two forms of verdict in the file, (Tr. 70 and 71), while probably the jury should have deducted the $8,131.63 from the $14,250.82, as shown by the two verdicts, yet it is very clear that what the jury did was, they found that the plaintiff had coming on the contract and for extra work, $14,250.82 and that the Defendant had an offset against that amount to the extent of $8,131.63, these two amounts were unquestionably unanimously agreed upon by the jury, then it became only a mathematical question, of deducting the lesser from the greater and rendering a judgment for the plaintiff for the amount of the difference. The trial judge convinced himself at the time the jury returned the verdict that that was their definite intent. I have always thought that if a verdict was definite enough that the Court could determine what was meant by the jury, that the verdict was sufficient and that the trial judge should render the judgment based thereon. This is very true where the general verdict and the special findings conflict and Rule 49 of Federal Rules of Civil Procedure provides that the jury may return a special verdict in the form of special written findings upon each issue of fact. In that event, the Court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidences * * * it further provides that if in so doing, the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives right of trial by jury of the

issue so omitted unless before the jury retires, he demands its submission to the jury.

Paragraph (b) of Rule 49, provides "the Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict * * * when the general verdict and answers are harmonious, the Court shall direct the entry of the appropriate judgment upon the verdict and the answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the Court may direct the entry of judgment in accordance with the answers notwithstanding the general verdict * * * Naturally the Supreme Court in making these rules, realized that the trial judges in these Courts were men far above normal intelligence and men trained in the law who were trying to do justice between the parties, therefore, these rules give a broad discretion to the trial judge in rendering the judgment on the verdict, so long as he is able to understand and determine the intent of the jury.

These two verdicts in our opinion are not against the instructions given by the Court. The instructions set out above clearly show how the jury could arrive at a conclusion that the Court wanted them to find the amount due the plaintiff for extra work and the balance due on the contract and also wanted them to determine the extent of the defendant's off-set by reason of the plaintiff's failure to comply with the

terms of the contract and to finish the job and knowing all of the facts in the case as we naturally do from having been present in all of the proceedings, we can certainly see no prejudicial action on the part of the Court. The jury clearly showed by their verdict No. 1 that they believed there was a balance due on the contract and for extra work in the sum of $14,250.82 and also found that against that amount, the defendant on the cross-complaint was entitled to recover an off-set against said sum to the extent of $8,131.93. They even fixed the dates of the running of interest at the same time—to-wit: March 1, 1951 in both verdicts.

A careful reading of the evidence will surely disclose that the late Hon. Anthony J. Dimond thoroughly understood the two verdicts, did what the jury intended that he do in the matter and the plaintiff in preparing the judgment (Tr. 79) apparently understood thoroughly the intent of the jury as you will notice the wording of the judgment. Under Rule 61—Fed. Rules of Civ. Procedure, which reads as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or de-

fect in the proceeding which does not affect the substantial rights of the parties."

We sincerely believe that the trial Court committed no error in accepting the two verdicts and carrying out the intent and purpose of the jury in rendering the two verdicts.

ANSWER TO ARGUMENT NO. V.

It will be noted that the appellant claims error of the Court admitting Exhibit "T" which was one of the plans for construction and it is our contention that that cannot be raised here because it is not part of the transcript and is not properly covered by the designation of record. (Tr. 771.) We feel that if the exhibits were printed, this question would eliminate itself automatically, however, we believe the introduction was proper because of several reasons, one of which was that Anderson the engineer, that was furnished by Mr. Gothberg, and hired by Mr. Carr while testifying as a witness for Mr. Gothberg, testified on direct examination in response to questions by Mr. Arnell as follows (Tr. 613):

"Q. Did you revise the first plan that was drawn, for the purpose of moving the building back and tearing out a portion of the old foundation already constructed?

A. I didn't revise the plan. I drew the plan which is now in evidence.

Q. Is that the only plan that was in existence at the time the first contract was signed on May 25th, 1950?

A. It was the only plan in that contract. We had started work (581) on the remainder of the building, but was not part of the original contract. * * *

Q. Did you prepare all of the specifications that are specified in this litigation, Mr. Anderson? All the specifications?

A. I did not prepare them all personally. I had hired personnel under me that did prepare all of them.

Q. Are you familiar with all of them, then?

A. Yes, sir.

Q. Directing your attention, Mr. Anderson, to page SW-1 again—the last sentence in the first paragraph, which reads: 'This work shall include a concrete apron by the gas pumps, but shall not include the wallboard or finish carpentry on any interior partitions, with the exception of the shower room and one restroom.' I believe the original plans called for a block wall across the middle of the building, did they not?

A. Yes, a block fire wall.

Q. How high was that wall to be?

A. As I remember, it is eight feet.

Q. Did the plans and specifications contemplate any partition or wall to be constructed above that height of eight feet?

A. No, in this contract, no.

Q. Do you know what type of wall actually was constructed?

A. Yes, I have been in the building since and there is a frame wall. I don't remember just exactly what it consists of." * * *

These questions were asked and these answers given (Tr. 613):

"Q. Did you design the marquee also, Mr. Anderson?

A. Yes, sir, I did.

Q. Are you familiar with the manner in which it was constructed, and the conditions that were incurred during construction?

A. Yes, sir.

Q. Was it necessary to install extra beams or more beams, I should say perhaps, than were available on the job?

A. Yes, there was a channel that ran across the back of the structural member of the marquee, which were 2 by 14 lumber, and that channel was run across the back to support the back of the 2 by 14's, so when snow got on the marquee it wouldn't drop down, and it was also necessary to put in a support on the front of the building down to that channel.

Q. Under your interpretation of the specifications, would the cost, and also the installation of the beam, be an additional charge for which Mr. Gothberg would be entitled to reimbursement?

A. The specification stated there was steel on the job. The amount of steel was not stated. At the time the contract was let, we did not have information as to how much steel was there. My interpretation of the specifications would say that the cost of the beam itself would be extra; however, the installation was required by the contractor." * * *

Then again (Tr. 638), cross-examination by Mr. Bell:

"Q. Now, Mr. Anderson, how long have you known Mr. Gothberg?

A. About four years.

Q. And you have handled several matters for Mr. Gothberg, have you?

A. I have been concerned with Mr. Gothberg on one Government contract, and on this contract. I have known him personally due to this association.

Q. When did you first meet Mr. or Mrs. Carr?

A. I am not sure whether it was late in the Fall of 1949 or in the Spring of 1950." * * *

(Tr. 640):

"Q. When did you draw those plans that's marked BCG No. 1?

A. I wouldn't remember the exact date.

Q. That is the foundation plan.

A. I don't remember the exact date. I believe there is a date on the plan.

Q. Would you look at this plan and tell the jury when you drew that, if you did draw it?

A. It is dated April 5, 1950. That would be the date of completion of the plan.

Q. April 5, 1950? Is that the first plan, now, that was drawn by you or your associate?

A. This was the first final plan. There were preliminary plans before this, but this is the first final plan.

Q. Where as those preliminary plans?

A. I imagine I have destroyed them. They were merely sketches (655) to give an idea of what we were going to do.

Q. Was that similar to the one you saw here this morning, and said you had never seen it before? Were the preliminary plans similar to that?

A. No, it would be very similar to the one you have there as BCG 1.

Q. Do you think that is a preliminary plan, or is that one of the final plans?

A. That was a final plan.

Q. And that was dated in April of 1950?

A. Yes, sir.

Q. Now, I am calling your attention to BCG 8. I will ask you to state to the jury the date that you drew that, if you did draw it?

A. It is dated August 21st, 1950.

Q. Now, that is evidently the date that that plan was first brought into existence as a finished plan, wasn't it?

A. That was the date that it was drawn up in the finished plan, made up into the final set, yes.

Q. Now, Mr. Anderson, would you look at this drawing here, in the middle, and tell us what that represents—from there across, and back down to there. Is that steel?

A. That is a 12 foot channel, weighing 20.7 tons per foot.

Q. And that is a steel channel—iron, is it?

A. Yes, sir (656).

Q. And when you drew this plan, you drew that in there, did you?

A. Yes, sir. I don't believe that I did the actual drawing on this; however, I am responsible for the drawing here.

Q. I will ask you what that instrument is to the right in the middle of the plan, and to the right side. What does that represent? It says beam, does it not?

A. That is the 14 inch wide flange—30 pound beam for the door.

Q. Steel beam?

A. Yes, sir.

Q. Then is this the marquee here—the drawing for the marquee?

A. It is a structural drawing for the marquee, and it also has some architectural details on it.

Q. Now, was the contract let to Mr. Gothberg based upon these plans, the whole set of plans, all the way through?

A. Yes, sir. Wait a minute—there were two contracts.

Q. I am speaking of the main contract—September 19th—for the building?

A. Yes, sir." * * *

(Tr. 655):

"Q. What is this instrument here?

A. This instrument is an angle iron support to hold the end of this channel from lifting up, due to weight at the end of this marquee. (658)

Q. Was the marquee built according to the specifications and plans, by Mr. Gothberg?

A. Yes, sir.

Q. Then those pieces of steel drawn in there, are they all in place?

A. Yes, sir." * * *

We call your attention to the cross-examination of Mr. Gothberg, (Tr. 153), as follows:

"Q. Mr. Gothberg, would you look at this map here—this plat—and see if that is your initials on there?

A. That is right.

Q. Did you put it there?

A. I did.

Q. And you then made the contract knowing exactly about this?

A. Oh, yes, I knew.

Q. And, Mr. Gothberg, what does this drawing right through here represent?

A. That is the walls.

Q. Is that a wall? (78)

A. That is right.

Court. The jury can't see what counsel is pointing at. If it is very important I would suggest you staple it to the board. Counsel can do as he pleases.

Mr. Bell. Yes, your Honor, I think we should do that.

Q. Mr. Gothberg, would you come down so the jury can see. Now, did one of those beams go through here?

A. No.

Q. Where did the beams go?

A. Here's the beam.

Q. Is that the beam?

A. Yes.

Q. That is the beam you charged him $500 for?

A. That is right.

Q. Where is the beam that you charged him the other?

A. It don't show on the plan. That's on top of this end here to carry the end of the joists.

Q. Mr. Gothberg, didn't your just misunderstand the drawing—isn't that a beam right there?

A. No, this is the wall.

Q. But you put the beam in all right?

A. Oh, yes.

Q. You learned from the plan that the beam had to be in there, did you?

A. No. (79)

Q. How did you learn that the beam had to be in there?

A. It was no plan drawn for that beam that holds the roof.

Q. Mr. Gothberg, all of this drawing was there at the First National Bank, and you and Mr. Cuddy and Mr. Burton E. Carr all went over these together, didn't you?

A. We did, yes, in Mr. Cuddy's office.

Q. That is the senior Mr. Cuddy?

A. Yes.

Q. And there hasn't been any change in the plans—these papers—in anyway, has there?

A. No.

Q. So you initialed this so that you could identify it? Where is your initials?

A. Right here." * * *

This seems to us to have been the same drawing Exhibit "T" that is mentioned throughout Argument V, and since the drawing, Exhibit "T", is not made a part of the record, there is no way of telling whether it is or is not, and the Court should give this assignment Argument No. V, no consideration.

We are not going to burden the Court further, by added reading of excerpts regarding this marquee as shown by the pencil drawing added and made a part of Exhibit "T", but it clearly shows that the pencil drawing in Exhibit "T", must have been used as authority for the other drawings because it was car-

ried forward in the other plans and the very fact that Mr. Anderson denied ever having this plan or denied having initialed it, and Mr. Carr testified that he was present at various times and Mr. Anderson did have it in his possession, there being a conflict in the testimony as to the initials on the plan and various other marks on the plans, then the same was properly admitted even though Mr. Gothberg might have said he did not remember having seen it. Nevertheless the instrument itself was a silent witness to the fact that it was the original plan from which later plans were made therefore we can see no error whatsoever in the late Honorable Anthony J. Dimond permitting it to be introduced in evidence and the citations are not in point at all.

The *Perkins v. Haskell* case as in 31 Fed. 2d 53, has no similarity and is not in point.

ANSWER TO ARGUMENT NO. VI.

It is contended that appellant's witnesses were permitted to testify contrary to the terms of the written contract between the parties—it is contended that Victor C. Rivers, the expert witness, as an engineer, testified that certain work actually performed by the appellant, based upon witnesses' examination of the contract was included in the terms of the contract, and was not properly chargeable as extras, this does not seem to need answer as it is self-answering.

If an engineer who is a specialist in construction engineering cannot testify to the terms of the contract before him, as to whether certain things were included or were not included therein, it would be a sad state of affairs and it will be noted that the plaintiff, Gothberg, had his engineer, Mr. Anderson, testify to the same things in reverse as testified to by Mr. Rivers, and the case cited by the appellant—*Castner Electrolytic Alkali Co. v. Davies,* 154 Fed. 938—is an action for damages for an explosion of a water heater brought under the New York Employer's Liability Act and this case does not support appellant's contention. We quote Syllabus 4 and 5 as follows:

"4. Evidence—Competency—Opinion of Experts. While it is competent for expert witnesses to enumerate the various causes which might have produced a given effect, and to state what bearing specific facts shown in evidence, would have upon the probability or improbability or one or more of such causes being operative at the time and place, it is not competent for them to state an opinion upon all the evidence, as to what cause was in fact operative; that being the final inference to be drawn by the jury."

"5. Appeal and Error—Review—Harmless Error. The erroneous admission of the opinions of witnesses as to the cause of an explosion held without prejudice, where the material facts were not in dispute, and the opinions were merely arguments therefrom. (Ed. Note—for

cases in point, see Cent. Dig. Vol. 3, Appeal and Error, *4153.)"

And the next case cited by appellant in his brief is *United States v. George A. Fuller Co., Inc.,* 300 Fed. 206, a District Court opinion effecting certain pleadings and is an action wherein the Government had sued the contractor on a cost plus basis contract for negligence and wrongful acts specifying a few of such acts and it is held that it would not be permitted to have general damages alleged, the difference between cost of construction paid by Government and reasonable cost of construction under existing circumstances, shown by the opinion of experts.

It will be remembered that both the plaintiff and the defendant in the case at bar used expert witnesses. Anderson was used by the plaintiff and Rivers by the defendant to testify as to the value of the extras also as to whether or not the work done complied with the terms of the specifications and contract, and it is our humble opinion that this was a proper method used by both parties.

In the case of *Campbell, J., v. The Domira* (DCED N.Y. 1931), 49 Fed. 2d 324, this is an admiralty case decided in the District Court of the Eastern District of New York by Judge Campbell and is based upon hypothetical questions asked of the expert Robinson, called on behalf of the Domira and were all in some considerable degree based upon the testimony of the officers and crew of the "Ireland" taken by deposition, and Syllabus 5 and 8 read as follows:

"5. Evidence—552.
Experts' answers to hypothetical questions, based on incompetent testimony, held inadmissible."

"8. Evidence—553(4).
Expert testimony, based on facts not in evidence and improper inferences from facts proven, is inadmissible."

We cannot see anything in the case that in any way assists the appellant here, and even the writer of the brief indicates that the testimony of the witness, Rivers, was not in violation of the parol evidence rule but claims that the witness, Rivers, was permitted to testify that certain parts of the work performed were covered by the contract and were not extras.

In *Hamilton v. United States,* 73 Fed. 2d 357, a case cited and relied upon by the appellant, if in point, is not in support of appellant's contention, we quote Syllabus 3 and 5 which we think are directly opposite to the contention of appellant:

"3. Evidence—470.
Expert opinions are allowed by way of exception to general rule that witness is to give facts observed but not his conclusions from them, only where there is real helpfulness or necessity to resort to opinions."

"5. Evidence—506.
Admissibility of question put to expert asking his opinion on exact ultimate issue before jury depends on nature of issue and circum-

stances of case, *large amount of judicial discretion being involved.*" (Emphasis ours.)

The questions asked engineer, Rivers, in this case was whether or not certain work was provided for in the plans and specifications (see brief of appellant, page 27), this was a direct question that any engineer could answer by looking at the contract and stating whether the stairway and stairwell to the boiler room was provided for in the contract or not and called for an interpretation of the plans, specifications, and contract which were within his specialty and while he was testifying as an expert we feel that he had a right to answer the question as the Honorable Anthony J. Dimond expressed when he stated "He is testifying as an expert on the plans and specifications and I think the question may be answered—objection is over-ruled." Especially in view of the fact that engineer Anderson testified for the plaintiff and was asked similar questions, answering them at all times, and to single out one particular question and answer would defeat justice and if error, at all, it would be harmless error, and we contend it was not error at all.

It should be borne in mind that both of these engineers were permitted to testify the meaning of certain signs and symbols shown by the plans and specifications.

Engineering being a definite type of profession, any engineer who is an expert should be permitted to testify to the general interpretation of these constantly

used characters in the drawings of plans and specifications and the meaning thereof and that nothing more was done in this case by either engineer and if it was objectionable on the part of Mr. Rivers' testimony, then it was surely balanced off and became a harmless error when engineer Anderson was permitted to give his opinion and explain details of the drawings, plans, and specifications and we feel there is no merit to this argument whatsoever.

ANSWER TO ARGUMENT NO. VII.

This argument stated that the appellant attempted to prove a usage in the area in trade—to-wit: That an owner moving in and occupying a building being finished by the contractor, accepted the building and waives any non-compliance with the building contract. This matter was injected into the evidence by asking Mr. Gothberg if he was familiar with the custom of common usage that was recognized in the contract trade where an owner occupies a building that is in the process of construction or being finished and the witness answered—"I certainly am." The Court then sustained an objection by stating: "I think the practices could not be binding upon the Defendant unless it is shown that the Defendant had knowledge of the practice. To say that contractors have a practice is not sufficient, and the objection is sustained." No further reference is made to the matter in the brief and in the first place, the Court in our opinion was exactly

correct in his ruling and the evidence all the way through shows that Mr. Carr's previous lease had expired and he was pleading with Mr. Gothberg to finish the job, so he could move in and Mr. Gothberg acquiesced in Mr. Carr's moving into the building even before the doors were installed so that he could have a place to put his equipment and much of the work was finished after that and there is no showing anywhere in the evidence that Mr. Gothberg was put to any extra work or inconvenience by reason of moving of the equipment into the place and if the plaintiff had been permitted to testify to this custom, then the custom as contended by him would be so highly unethical and unjust that no Court would be bound thereby and the very idea of contending that because Mr. Carr moved his equipment into the building, with the knowledge and acquiescence and consent of Mr. Gothberg, that he, Mr. Gothberg then had no obligation to finish the building. That would be ridiculous.

We do not believe there was any error committed in the ruling of the late Honorable Anthony J. Dimond, in this regard.

CONCLUSION.

In conclusion, we most respectfully contend to this Honorable Court, that the only merit in this appeal, is the cross-appeal of the defendant, Burton E. Carr, and that the plaintiff having received more money than he was entitled to, for the portion of the work,

he so sloppily and defectively performed, should have no relief whatsoever at the hands of this Honorable Court or at the hands of this or any Court because he had been overpaid several thousands of dollars. We most humbly contend that the only error committed in this case on the part of the trial Court, was in not sustaining the defendant's motion to dismiss the plaintiff's complaint at the close of all of the evidence, as to each and every count therein, and submitting the case only to the jury, on the question of the cross-complaint since all of the evidence conclusively shows that there was no actual performance of the contract and not even substantial performance therewith, therefore the plaintiff had no right of recovery until he proved substantial performance at least which he did not do.

Dated, Anchorage, Alaska,
April 12, 1954.

Respectfully submitted,
BELL & SANDERS,
BAILEY E. BELL,
WILLIAM H. SANDERS,
Attorneys for Burton E. Carr,
Appellee-Appellant.